



October 27, 1999

Ms. Julia M. Vasquez
Haynes & Boone, L.L.P.
201 Main Street, Suite 2200
Fort Worth, Texas 76102-9834

OR99-3033

Dear Ms. Vasquez:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act chapter 552 of the Government Code. Your request was assigned ID# 127660.

The City of Texarkana (the "city"), which your office represents, received a request for a variety of employment related information concerning Officer Jim Stuckey, Officer Barbara Solomon, and Officer Thomas White. In response to the request, you submit to this office for review the information which you assert is responsive. You state that the submitted records are excepted from required public disclosure by sections 552.101, 552.102, 552.103, 552.108, 552.117, and 552.130 of the Government Code. We have considered the exceptions and arguments you raise, and have reviewed the information submitted.

Section 552.101 of the Government Code excepts from required public disclosure "information that is confidential by law, either constitutional, statutory, or by judicial decision." Under common-law privacy, private facts about an individual are excepted from disclosure. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). Section 552.102(a) protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as that of the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Consequently, we will consider these two exceptions together for the submitted records.

The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. Most of the submitted information does not comport with this standard.

Most of the submitted information at issue relates to the performance and job functions of public employees. There is a legitimate public interest in the work behavior of a public employee and how he or she performs job functions. Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 444 (1986) (employee information about qualifications, disciplinary action and background not protected by privacy), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 (1983) (employee performance audit not protected by privacy), 284 (1981) (letters of recommendation not protected by privacy). However, this office has found that the following types of information are excepted from required public disclosure under privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse or the detailed description of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

After examining the submitted documents, we find that some of them must be withheld as personal private information and others must be released. Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). Thus, a public employee's allocation of his salary to a voluntary investment program offered by his employer is a personal investment decision, and information about it is excepted from disclosure by a common-law right of privacy. Open Records Decision Nos. 600 (1992) (TexFlex benefits), 545 (1992) (deferred compensation plan). However, where a transaction is funded in part by the state, it involves the employee in a transaction with the state and is not protected by privacy. Open Records Decision No. 600 (1992). Some of the information at issue appears to involve a financial transaction between an individual and the governmental body, *e.g.*, the employees' health insurance premiums; therefore, such information is not subject to an exception under common-law privacy. However, to the

extent the personnel records, within Exhibits 2, 3 and 4, contain personal financial information not relating to the financial transaction between an employee and the city, the information is subject to protection under privacy. We have marked a representative sample of the *types* of information, within the submitted documents, that the city must withhold from the public pursuant to sections 552.101 and 552.102. *See* Gov't Code § 552.352.¹

Section 552.101 encompasses information protected by other statutes. We note that the polygraph reports within the submitted records are confidential. Texas law prohibits the public disclosure of the results of polygraph examinations. Section 19A(b) of article 4413(29cc), V.T.C.S., provides as follows:

Except as provided by Subsection (d) of this section, a person for whom a polygraph examination is conducted or an employee of the person may not disclose to another person information acquired from the examination.

The requested information includes polygraph reports that are deemed confidential by section 19A(b). Since the polygraph reports are confidential by law, the city must withhold this information from disclosure pursuant to section 552.101.

Pursuant to section 552.101, we also note that the records you submitted to this office for review include W-4 forms.² Prior decisions of this office have held that title 26, section 6103(a) of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Form W-4, the Employee's Withholding Allowance Certificate, is confidential as tax return information under title 26, section 6103(a) of the United States Code and must not be released. Open Records Decision No. 600 at 8-9 (1992).

You claim that the "interdepartmental file[s] maintained by the Chief of Police" are excepted from required disclosure under section 143.089 of the Local Government Code. Section 143.089(b) states that "[a] letter, memorandum, or document relating to alleged misconduct by the fire fighter or police officer may not be placed in the person's personnel file if the employing department determines that there is insufficient evidence to sustain the charge of

¹We advise you to refer to the discussion set out above and to our representative sample markings in withholding records.

²Although you did not claim any exception for this information, this office will raise section 552.101 on behalf of a governmental body. Open Records Decision Nos. 481(1987), 480 (1987).

misconduct.” Files of internal affairs investigations that result in disciplinary action are not excepted from disclosure based on section 552.101. However, when the records concern a complaint against a police officer for which no disciplinary action was taken, the records are confidential under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. *See City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946 (Tex. App.–Austin 1993, writ denied).

The court in *City of San Antonio*, addressed the availability of information that is contained in the department’s internal file pursuant to section 143.089(g). The court determined that section 143.089(g) makes confidential any records kept in a police department’s internal file. No such confidentiality provision governs information that is required to be maintained in the civil service personnel files pursuant to section 143.089(a) through (c). Information maintained in the civil service personnel files must generally be released to the public upon request, unless some provision of chapter 552 of the Government Code permits the civil service commission to withhold the information. Local Gov’t Code § 143.089(f); Gov’t Code §§ 552.006, .021; Open Records Decision No. 562 at 6 (1990) (construction of Local Gov’t Code § 143.089(f) provision requiring release of information as required by law).

We agree that if any of the responsive information is maintained in the section 143.089(g) internal personnel file, this information is confidential and may not be disclosed. However, we note that if there is other information that would be required to be maintained in the civil service file, such information is not generally confidential under section 143.089. In this instance, you have not submitted sufficient information from which we can make a determination whether disciplinary action was taken or there was insufficient evidence to sustain the charges. If the investigations led to disciplinary action the information must be released, however, if the charges were not sustained, then the information must be withheld. To the extent that responsive records, submitted as Exhibits 5, 6, 7, 8,³ 9, and 10, are confidential under section 143.089(g) or other law, these may not be disclosed.⁴ *See* Gov’t

³Although you state that Internal Affairs investigation number 99-01, submitted as Exhibit 8, “is also excepted from disclosure pursuant to section 552.108 because it is currently an open criminal investigation,” we note that since the included arrest report is related to an arrest in another state, we do not believe section 552.108 is implicated. Furthermore, we note that section 552.108 is not applicable when no criminal investigation is undertaken. *See Morales v. Ellen*, 840 S.W.2d at 526 (predecessor statute to section). In fact, this office has determined that section 552.108 does not protect general personnel information from public disclosure. Open Records Decision No. 562 at 10 (1990).

⁴Texas law prohibits the public disclosure of psychological records. Communications between a patient and a mental health professional and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a mental health professional are confidential. Health & Safety Code § 611.002(a).

Code § 552.352 (the distribution of confidential information is a criminal offense). The records otherwise are public and must be released, unless subject to our section 552.101 discussion above, or subject to another exception addressed below. Gov't Code § 552.303(e).

Section 552.103(a) excepts from disclosure information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision Nos. 588 (1991), 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under 552.103(a). You argue that a civil service hearing is "litigation" for purposes of section 552.103.

This office has determined that a contested case under the Administrative Procedure Act (the "APA"), Government Code chapter 2001, constitutes "litigation." See Open Records Decision Nos. 588 (1991) (former State Board of Insurance proceeding), 301 (1982) (hearing before Public Utilities Commission). Civil service hearings are not subject to the APA, but to Local Government Code chapter 143. In the situation at hand, you state that "Mr. Stuckey has formally appealed his indefinite suspension to a third-party hearing examiner pursuant to [Government Code] Section 143.057." That provision provides that an independent third party hearing examiner has the same duties and powers as the commission, including the right to issue subpoenas. See Local Gov't Code § 143.057(f); see also *id.* § 143.010(d), (e) (commission subpoena authority). The city is required to conduct the hearing fairly and impartially and render a just and fair decision.⁵ See *id.* § 143.010(g). Discovery takes place and evidence is presented at the hearing, and the independent third party hearing examiner

⁵In general, we believe the procedures in place under Local Government Code chapter 143 should govern the release of information that relates to a pending appeal conducted pursuant to Local Government Code chapter 143. However, we note that Local Government Code section 143.010(h) states that the commission "shall maintain a public record of each [appeal procedure] proceeding with copies available at cost." This provision would require the commission to release a hearing transcript in its possession.

hears and resolves questions of fact. A district court may hear an appeal of a hearing examiner's award only on the grounds that the arbitration panel was without jurisdiction or exceeded its jurisdiction or that the order was procured by fraud, collusion or other unlawful means. *Id.* § 143.057(j); *see also id.* § 143.057(c) (decision to appeal to independent third party hearing examiner results in waiver of all rights to appeal to district court except as provided by Local Gov't Code § 143.057(j)). Thus, the district court does not serve as the forum for resolving the controversy on the basis of evidence; the civil service hearing so serves.

You have shown that litigation is reasonably anticipated or pending. *See generally* Open Records Letter No. 98-2707 (1998). You have also shown that a portion of the requested records relates to the litigation. *See* Open Records Decision Nos. 588 (1991); *Texas Legal Found.*, 958 S.W.2d at 483. Consequently, we find that you may withhold a portion of the requested information under section 552.103. Specifically, we conclude that you may withhold Mr. Stuckey's personnel records, Exhibits 2 and 5, as well as a portion of Officer Solomon's personnel records, which *relates* to the "indefinite suspension" of officer Stuckey, and Internal Affairs investigation numbers 99-02 and 99-03, Exhibits 9 and 10 respectively. However, you have not demonstrated how most of Officer Solomon's personnel records, Exhibits 3 and 6, and Officer White's records, Exhibits 4 and 8, relate to the anticipated litigation; thus, you may not withhold this information under section 552.103.

In reaching this conclusion, however, we assume that the opposing party in the litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103(a) ends once the litigation has concluded.⁶ Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We next consider whether some of the requested information must be withheld pursuant to section 552.117 of the Government Code. Gov't Code § 552.352 (distribution of confidential information is a criminal offense). Section 552.117(2) of the Government Code excepts from public disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members. Therefore, we conclude that the information subject to section 552.117(2) must be withheld. Gov't Code § 552.352.

⁶We note that some of the information in the submitted documents is also confidential by law. Therefore, once litigation has concluded, should there be a subsequent request for this information, we advise the city to exercise caution and seek a ruling from this office concerning the records. *See* Gov't Code § 552.352, 552.101 (NCIC/TCIC records), 552.117 (peace officer's information), 552.130 (release and use of information obtained from motor vehicle records); *see also* V.T.C.S. art. 4495b § 5.08 (access to medical records is not governed by chapter 552 of Government Code, but rather provisions of MPA).

Finally, we note that the submitted records contain Texas drivers' license numbers for the officers whose personnel files are at issue. Section 552.130 of the Government Code provides:

(a) Information is excepted from the requirements of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of the state;

(2) a motor vehicle title or registration issued by an agency of this state; or

(3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

(b) Information described by Subsection (a) may be released only if, and in the manner, authorized by Chapter 730, Transportation Code.

Accordingly, we conclude that the drivers' license numbers, and copies of the identification cards, within the personnel files must be withheld pursuant to section 552.130 of the Government Code.⁷

In conclusion, we note that all of the requested information not specifically addressed above must be released to the requestor in its entirety. We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Sam Haddad

Assistant Attorney General
Open Records Division

⁷Although you did not raise section 552.119, we note that this section also provides an exception from disclosure for photographs of police officers. See Open Records Decision No. 502 (1988).

SH/nc

Ref.: ID# 127660

Encl: Submitted box of documents to follow

cc: Ms. Theresa Gage
Texarkana Gazette
315 Pine Street
Texarkana, Texas 75501
(w/o enclosures)